IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS MARSHALL DIVISION

LODSYS, LLC,

Plaintiff,

٧.

CIVIL ACTION NO. 2:11-cv-272

ATARI INTERACTIVE, INC.;
COMBAY, INC.;
ELECTRONIC ARTS INC.;
ICONFACTORY, INC.;
ILLUSION LABS AB;
MICHAEL G. KARR D/B/A SHOVELMATE;
QUICKOFFICE, INC.;
ROVIO MOBILE LTD.;
RICHARD SHINDERMAN;
SQUARE ENIX LTD.;
TAKE-TWO INTERACTIVE SOFTWARE,
INC.,

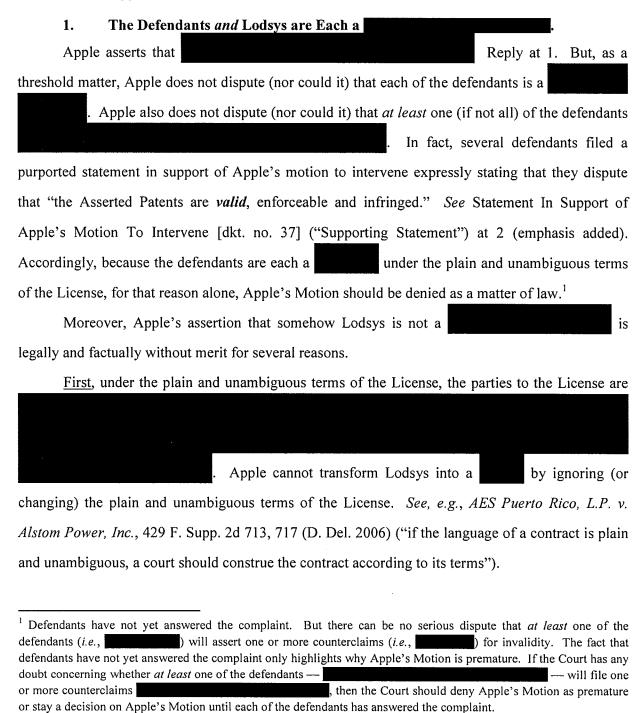
Defendants.

PLAINTIFF LODSYS, LLC'S *REDACTED* SURREPLY TO APPLE INC.'S REPLY IN SUPPORT OF MOTION TO INTERVENE

REDACTED VERSION

A. Apple Ignores the Plain and Unambiguous Terms of the License.

Apple asserts that "Lodsys's License Argument" is supposedly irrelevant "for at least three reasons." Reply In Support Of Motion To Intervene [dkt. no. 35] (the "Reply") at 1. As discussed below, each of Apple's "three reasons" fails as a matter of law.



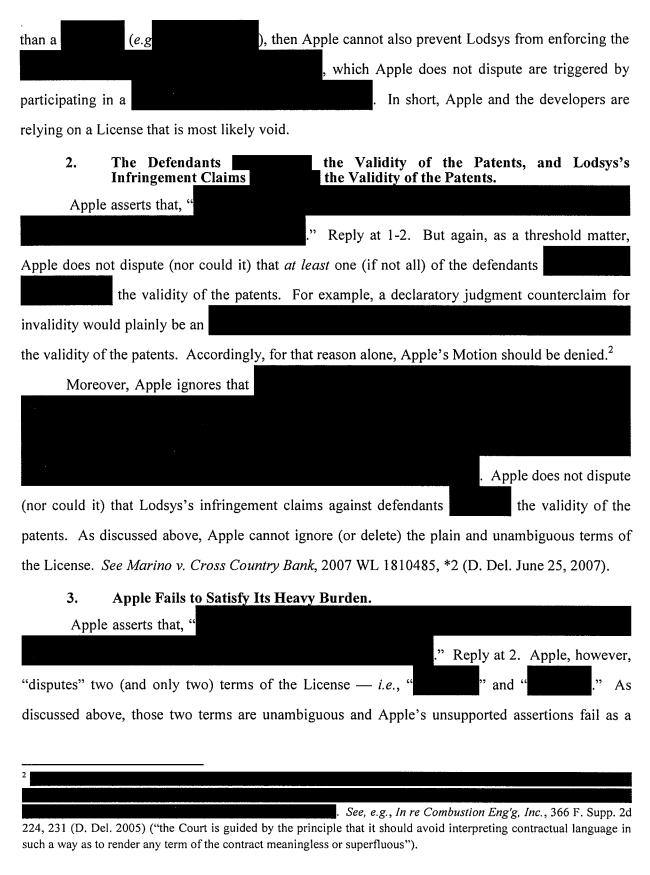
Third, Apple bases its entire argument that Lodsys is not a solely on the following assertion: "

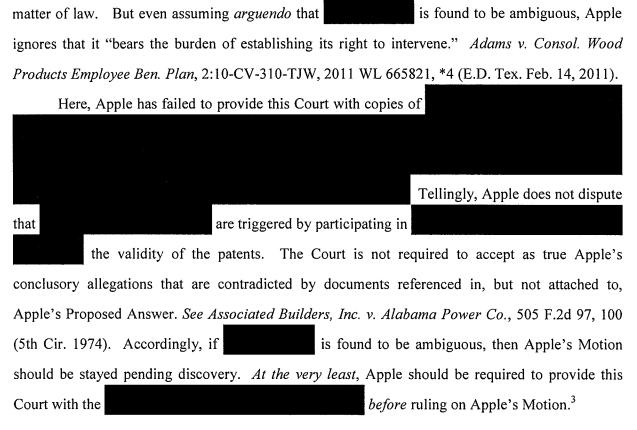
1. But Apple does not identify what Lodsys is if not a half assertion that half assertion that half assertion. And Apple offers no further explanation for its bizarre and unsupported assertion. Put simply, Apple's size and financial position as the most valuable company in the world does not provide grounds for Apple to ignore, change, or delete the plain and unambiguous terms of the License.

Fourth, if Apple is correct that , then accepting Apple's unsupported assertion would eviscerate the legal doctrine of third party beneficiaries. *See, e.g., Rottlund Homes of New Jersey, Inc. v. Saul, Ewing, Remick & Saul, L.L.P.*, 243 F. Supp. 2d 145, 153 (D. Del. 2003) ("Under this doctrine, an individual who is not a party to a contract has standing to enforce the contract under certain circumstances.").

Fifth, Apple's unsupported assertion that Lodsys is not a selected by the fact that Apple filed the License under seal and then moved to maintain the License under seal for attorneys' eyes only, precluding even Lodsys from reviewing the License. See Apple Inc.'s Motion For Leave To File Under Seal [dkt. no. 5]. If Lodsys is not a (as Apple now asserts), then Apple has no basis for precluding Lodsys from reviewing the License.

Finally, if the Court accepts Apple's unsupported assertion that Lodsys is something other





B. Apple Ignores the Infringement Claims and the Plain and Unambiguous Terms of Its Own Agreements with Developers.

Apple repeatedly asserts that supposedly "Lodsys does not contest that Apple's technology" lies at the "heart of this case." Reply at 1. But Apple ignores that the applications made, used, and sold by defendants (and not Apple) are "configured to elicit, from a user, information about the user's perception of the commodity." See Claim 1 of U.S. Patent No. 7,222,078. The defendants (and not Apple) make, use, and sell the configured applications to end-users. And the "commodity" is the application made, used, and sold by defendants, not Apple's technology. Accordingly, Apple's technology is not the "heart of the case."

Similarly, Apple's assertion that only it knows "how Apple's technology works" (see Reply at 5) is irrelevant, because the defendants obviously know how they make, sell, and use the infringing applications. And Apple ignores the presumption that its purported interest is adequately

³ Relying on *Pin v. Texaco, Inc.*, 793 F.2d 1448 (5th Cir. 1986), Apple asserts discovery is improper. *See* Reply at 2. But in *Pin*, the proposed plaintiff-intervenor requested discovery concerning the claims he asserted against defenddants in his proposed complaint. *See* 793 F.2d at 1450.

represented where (as here) the defendants have identical objectives. See United States v. Texas Educ. Agency (Lubbock Indep. Sch. Dist.), 138 F.R.D. 503, 506 (N.D. Tex. 1991).

Apple also asserts that supposedly its interests are more than economic. *See* Reply at 3. But then, hoping to avoid the plain and unambiguous terms of its agreements with developers, Apple focuses on the "exchange of payment" with developers. *See* Reply at 4. Apple also ignores that, in its opening Motion, Apple asserted that the "harm" absent intervention is Apple's inability "to preserve its substantial *economic interest* in its Developer relationships and sales." Motion at 11.

Moreover, Apple again asserts that its purported supplier-customer relationship with developers is sufficient. *See* Reply at 3-4. But Apple ignores the plain and unambiguous terms of its own agreements with developers that expressly disclaim any such relationship. *See* Huck Decl., Ex. 4 at ¶15.4. Apple also ignores that its agreements with developers expressly provide that the developers are "solely responsible for any and all claims and liabilities involving or relating to, the Licensed Applications." *Id.* at Schedule 1, ¶1.3.⁴

C. Apple Ignores that Common Issues are Not Sufficient for Permissive Intervention.

Apple asserts that "Lodsys concedes that Apple's Motion raises many common issues of law and fact." Reply at 5. But Apple ignores that "[t]he existence of a common question of law or fact does not automatically entitle an applicant to intervene." *Texas Educ. Agency*, 138 F.R.D. at 507. Apple ignores that adequate representation by the defendants is sufficient to deny permissive intervention. *See id.* at 508. Apple ignores that the denial of permissive intervention is appropriate because Apple brings no new issues. *See Ingebretsen on Behalf of Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 281 (5th Cir. 1996). Apple also ignores that it cannot demonstrate an independent ground for jurisdiction because it did not acquire under the plain and unambiguous terms of the License.

⁴ Apple asserts "the Court cannot at this stage make a factual determination regarding disputed terms of a different contract outside the pleadings." Reply at 4. But the agreements with developers are not "outside" the pleadings, because Apple references and relies on those agreements. Apple also asserts that Lodsys "argues that Apple's interest is insufficient because there is no indemnification obligation here." Reply at 3. Not true. Lodsys simply noted that Apple does not have any indemnity obligations to the developers, which distinguishes Apple's purported interest from several of the cases relied on by Apple. Importantly, Apple does not dispute that it requires the developers to indemnify Apple.

Dated: August 18, 2011. Respectfully Submitted,

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CERTIFICATE OF FILING UNDER SEAL

The undersigned certifies that the un-redacted version of the foregoing document was filed under seal, pursuant to this Court's June 21, 2011 Order Granting Apple Inc.'s Motion For Leave To File Under Seal Exhibit A To the Declaration Of Jonathan C. Sanders In Support Of Apple Inc.'s Motion To Intervene [dkt. no. 12] (the "Order"). The redacted version of the forgoing document quotes or references the document the Court's Order requires to "be maintained under seal."

By: /s/ Christopher M. Huck Christopher M. Huck

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this response was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(V). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(d) and (e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by email, on this the 18th day of August 2011.

By: /s/ Christopher M. Huck Christopher M. Huck